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MARITIME case law, like the common law, does not recognize or sanction a cause of action for wrongful death; hence resort must be had to a statute in order to find a right of recovery However, each of the fifty states has a wrongful death statute, and there are two federal death acts as well. The problem, then, is not one of finding a statute which alters the harsh rule of the maritime case law, but of selecting the particular statute which will apply in a given case.

There are three basic situations which require judicial selection of a statute to provide a remedy for maritime wrongful death. In the first, the choice depends on the relationship which existed between the decedent and the defendant. In the other two, the locale is the determining factor. Also, as will be pointed out, there may be an overlap in which both a federal and a state statute will apply to different aspects of the same case. Since this article is concerned with only one of these situations, it is appropriate to define and eliminate the other two.

First, if the decedent was a member of the crew of a vessel and the suit is against his employer, the controlling statute is the Jones Act.[1] This act creates liability of an employer shipowner to his crew for wrongful death caused by negligence, and, in cases where death is not instantaneous or substantially contemporaneous with the original injury, provides for survival, to certain heirs of the decedent, of his personal cause of action for pain and suffering prior to death. It is not within the scope of this article to explore the ramifications of the Jones Act. It is relevant, however, to note that, even though a seaman's death occurs in port, within the territorial waters of one of the states, the Jones Act is the governing statute and displaces the wrongful death act of the state.[2]

Secondly, if the decedent was not a seaman, or if the suit to recover for a seaman's death is against others than his employer, the locale of the accident determines the choice of statute. If the death occurs more than three nautical miles off shore, the controlling statute is the Fed-

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[1] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1964).

[2] Gillespie v. United States Steel Corp., 379 U.S. 148, 1965 A.M.C. 1 (1964); Lindgren v. United States, 281 U.S. 38, 1930 A.M.C. 399 (1930).

eral Death on the High Seas Act,[3] which, however, is explicitly limited in its coverage to such off-shore deaths. Thus, there is no federal wrongful death statute applying to deaths of persons, other than seamen, on inland waters, i.e., in harbors, lakes, rivers, or the coastal waters of a state less than three nautical miles off shore. It is this third situation which is the subject of this article: deaths on inland waters in all situations other than seaman versus employer.

In this area it was long ago decided that the essential uniformity of federal maritime law would not be disturbed by applying the death act of the state in whose waters the death took place.[4] Accordingly, the federal courts sitting in admiralty looked to the law of the state where the death had occurred. Until eight years ago it was also generally held that the adoption of a state death act by courts of admiralty in cases of maritime death necessarily carried with it such common law concepts as the requirement that negligence of the defendant must be shown in order to establish liability and that the contributory negligence of the decedent would bar all recovery [5]

Under maritime law, however, it had become settled that, in cases of personal injury, a shipowner was not only liable for his negligence, but was also liable without fault for injury caused by the unseaworthiness of his vessel.[6] The doctrine developed first as to seamen and was then applied in favor of longshoremen,[7] certain types of repairmen,[8] and other maritime workers doing work historically done by the crew.[9]

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[3] 41 Stat. 537 (1920), 46 U.S.C. §§ 761-68 (1964).

[4] Western Fuel Co. v. Garcia, 257 U.S. 233 (1921). "The subject is maritime and local in character, and the specified modification of or supplement to the rule applied in admiralty courts, when following the common law, will not work material prejudice to the characteristic features of the maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." *Id.* at 242.

[5] Contributory negligence was held to bar recovery for maritime death in Nieport v. Cleveland Elec. Illuminating Co., 241 F.2d 916, 1957 A.M.C. 1258 (6th Cir. 1957) (Ohio statute); Curtis v. A. Garcia y Cia, 241 F.2d 30, 1957 A.M.C. 331 (3d Cir. 1957) (Pa. statute); Hartford Acc. & Indem. Co. v. Gulf Ref. Co., 230 F.2d 346, 1956 A.M.C. 527 (5th Cir. 1956) (La. statute); Feige v. Hurley, 89 F.2d 575 (6th Cir. 1937) (Ky. statute); Groonstad v. Robins Dry Dock & Repair Co., 236 N.Y. 52, 139 N.E. 777 (1923) (N.Y. statute); Cromartie v. Stone, 194 N.C. 663, 140 S.E. 612 (1927) (N.C. statute); Roswell v. Grays Harbor Stevedore Co., 138 Wash. 390, 244 Pac. 723 (1926) (Wash. statute).

[6] Mahnich v. Southern S.S. Co., 321 U.S. 96, 1944 A.M.C. 1 (1944).

[7] Seas Shipping Co. v. Sieracki, 328 U.S. 85, 1946 A.M.C. 698 (1946).

[8] The Tungus v. Skovgaard, 358 U.S. 588, 1959 A.M.C. 813 (1959) (a repairman); Pope & Talbot v. Hawn, 346 U.S. 406, 1954 A.M.C. 1 (1953) (a carpenter); Crawford v. Pope & Talbot, Inc., 206 F.2d 784, 1953 A.M.C. 1799 (3d Cir. 1953) (a tank cleaner).

[9] "Historically the work of loading and unloading is the work of the ship's service, performed until recent times by the crew. Every consideration, therefore, giving rise

Eight years ago, the Supreme Court was finally faced with the question whether there could be strict liability under a state death statute for death caused by unseaworthiness in the absence of the usual showing of negligence. In *The Tungus v. Skovgaard*[10] a maritime worker was killed aboard ship in New Jersey waters. A libel for wrongful death against the shipowner alleging only unseaworthiness as the ground for recovery was dismissed in the district court on the ground that a wrongful death action for unseaworthiness would not lie under the New Jersey Wrongful Death Act.[11] The court added that the shipowner owed no duty of exercising ordinary care to provide decedent with a safe place to work.[12] The New Jersey act created a cause of action for death caused by wrongful act, neglect or default, such as would, if death had not ensued, have entitled the injured person to recover damages.

The Third Circuit, reversing the district court, held that the New Jersey statute should be construed to create liability for maritime death caused by unseaworthiness without negligence.[13] The Third Circuit opinion says that each word in the phrase "wrongful act, neglect *or* default" has an independent meaning; hence the statute includes more than negligence.[14] The court stressed the statutory qualification of "wrongful act, neglect or default" that it must be of such nature that *the decedent could have recovered for personal injuries if the accident had not been fatal*, because if the decedent had survived, he could have recovered from the shipowner under maritime law on the basis of unseaworthiness.[15]

In the Supreme Court this judgment was affirmed, but the Court split into two groups on the reasons for the affirmance. Mr. Justice Stewart, writing for the Court stated the following:

1. There is no cause of action for wrongful death in the general maritime law;[16]
2. Admiralty will apply state death acts to cases of death on

to the liability and shaping its character bespeaks inclusion of men intermediately employed to do this work, save only that which is relevant to consent as a basis for responsibility." Seas Shipping Co. v. Sieracki, 328 U.S. 85, 96, 1946 A.M.C. 698, 708 (1945).

[10] 358 U.S. 588, 1959 A.M.C. 813 (1959).

[11] N.J. STATS. ANN. § 2A:31-1 (1952).

[12] Skovgaard v. The M/V Tungus, 141 F Supp. 653, 1956 A.M.C. 1587 (1956).

[13] Skovgaard v. The M/V Tungus, 252 F.2d 14, 1958 A.M.C. 619 (3d Cir. 1957).

[14] *Id.* at 17, 1958 A.M.C. at 622.

[15] Skovgaard v. The M/V Tungus, 252 F.2d 13, 18, 1958 A.M.C. 619, 622 (3d Cir. 1957).

[16] The Tungus v. Skovgaard, 358 U.S. 588, 590, 1959 A.M.C. 813, 815 (1959).

inland waters, but must look solely to the state law for the basis of liability;[17]

3. In the absence of a state court decision interpreting the statute as it applies to maritime deaths, the federal court may decide whether the state statute should be construed (and would be construed by the state's courts) to incorporate such admiralty concepts as absolute liability for unseaworthiness;[18] and

4. The decision of the Third Circuit that the New Jersey statute permitted recovery for unseaworthiness was not clearly erroneous, hence its interpretation would be accepted.[19]

Mr. Justice Brennan, writing for himself, Mr. Chief Justice Warren, and Justices Black and Douglas, wrote a separate opinion[20] stating that there was no need to "interpret" the state statute or to worry about whether the state court would construe the statute to incorporate maritime principles. It was his view that admiralty principles should be applied to maritime deaths just as they are to maritime injuries, with the state statute referred to solely for the purpose of creating a remedy.[21]

This opinion seems to ignore the difference between substantive and procedural law. Since maritime case law recognizes no cause of action for a maritime death, more than mere procedure is involved. Unless the state statute creates a cause of action (creates liability where none existed before), no question of "remedy" is even reached. Traditional concepts of procedural as distinguished from substantive law seem to be rejected by the flat statement that state law will be referred to only in order to create a "remedy" and that admiralty principles of substantive law will then be automatically applied. The Brennan approach has the virtue, if it be a virtue, of simplicity. Instead of worrying about each state statute as it comes in question, and trying to construe each statute on its own history and wording, Justice Brennan would pause just long enough to be sure there was a state death statute and then turn to general admiralty principles.

The other landmark case, decided by the Supreme Court at the same time as *Tungus*, is *United N.Y & N.J Sandy Hook Pilots Ass'n v. Halecki*.[22] This case also involved a shipboard death in New Jersey

[17] *Id.* at 592, 1959 A.M.C. at 816.
[18] *Id.* at 595, 1959 A.M.C. at 819.
[19] *Id.* at 596, 1959 A.M.C. at 820.
[20] *Id.* at 597, 1959 A.M.C. at 820.
[21] *Id.* at 604, 1959 A.M.C. at 824-25.
[22] 358 U.S. 613, 1959 A.M.C. 588 (1959).

waters. A diversity case was brought on the law side of a federal district court in New York, with the complaint alleging both negligence and unseaworthiness. The district court charged the jury that either negligence or unseaworthiness would create liability and that any negligence of the decedent would mitigate the damages, rather than bar recovery altogether. A jury verdict for the plaintiff was affirmed by the Court of Appeals for the Second Circuit, which held that the New Jersey statute should be construed to incorporate such maritime principles as comparative negligence and absolute liability for unseaworthiness.[23]

In the Supreme Court the same division again occurred. Justice Stewart, for the majority, stated that the Second Circuit had correctly viewed its task as one of interpreting the state statute, and he accepted the Second Circuit's decision that the New Jersey statute should be construed in a maritime death case to substitute the maritime rule of comparative negligence for the common law rule of contributory negligence. However, the decision was reversed because on the facts of the case, even under maritime principles, there was no warranty of seaworthiness to this decedent in the specialized repair work which he was performing at the time of his death.[24]

These two cases seem to establish a rule that the admiralty court cannot simply borrow the state-created "remedy" and then automatically apply admiralty principles, but must look to the statute for all purposes, including bases of liability, standards of conduct, and the validity of such defenses as negligence by the decedent. Admiralty principles and standards of conduct can be applied only if the state statute can be construed to incorporate and sanction such principles. That this is the tenor of the decisions is pinpointed by the Brennan concurring opinion in *Tungus* insisting that admiralty principles should apply in all inland waters death cases, remedially supplemented by state law [25]

A year later came another Supreme Court case which created a certain amount of confusion: *Goett v. Union Carbide Corp.*[26] In that case a worker was killed aboard ship in West Virginia waters. A libel in admiralty against the shipowner resulted in findings by the district court that the shipowner had been negligent and also that the vessel

[23] Halecki v. United Sandy Hook Pilots Ass'n, 251 F.2d 708, 1958 A.M.C. 1056 (2d Cir. 1958).

[24] United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki, 358 U.S. 613, 618, 1959 A.M.C. 588, 592 (1959).

[25] The Tungus v. Skovgaard, 358 U.S. 588, 597, 1959 A.M.C. 813, 820 (1959).

[26] 361 U.S. 340, 1960 A.M.C. 550 (1960).

had been unseaworthy, with a decree for the libelant. On appeal this was reversed by the Fourth Circuit, holding that there had been neither negligence nor unseaworthiness, and that the decedent's work was of such nature that the shipowner owed him no warranty of seaworthiness.[27]

The Supreme Court, in a per curiam opinion, held that, under the *Tungus* rule, the basic question was whether the state statute incorporated common law or admiralty principles in cases of maritime death.[28] Since the Fourth Circuit had not made it clear which standards they thought applied under West Virginia law, the case was remanded to the circuit court to decide whether West Virginia law adopted common law or maritime principles in cases of maritime death.[29]

However, one of the dissenting opinions and a "note" in this case created the real confusion. The note by the same four justices who had differed from the majority in *Tungus* stated that they joined in this decision solely under the compulsion of *Tungus*, but continued to disagree with the ruling of that case and reserved their position as to whether it should be overruled.[30]

The dissenting opinion by Justice Whittaker cast considerable doubt on the vitality of *Tungus*.[31] In effect, he stated that he thought the Fourth Circuit had considered the case as one in which admiralty principles applied, remedially supplemented by the state law In other words, the state statute created a remedy, but federal maritime principles controlled liability Astonishingly enough, Justice Whittaker went on to say that this is all that *Tungus* stands for and that he agreed with Justice Brennan's separate opinion in that case (although he had voted with the majority in *Tungus*).

If federal principles remedially supplemented by the state statute is all that *Tungus* stands for, it is difficult to understand why Justice Stewart wrote the majority opinion as he did and why Chief Justice Warren and Justices Brennan, Black, and Douglas felt it necessary to present a separate opinion. It is virtually impossible to reconcile Justice Whittaker's vote in *Tungus* with his dissent in *Goett*.

To add to the confusion, at the same time as *Goett* another case came before the Supreme Court, *Hess v. United States*.[32] That case

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[27] Union Carbide Corp. v. Goett, 256 F.2d 449, 1959 A.M.C. 124 (4th Cir. 1958).

[28] Goett v. Union Carbide Corp., 361 U.S. 340, 342-43, 1960 A.M.C. 550, 551-52 (1960).

[29] *Id.* at 343-44, 1960 A.M.C. at 552.

[30] *Id.* at 344, n.5, 1960 A.M.C. at 553.

[31] *Id.* at 345, 1960 A.M.C. at 554.

[32] 361 U.S. 314, 1960 A.M.C. 527 (1960).

involved a death on inland waters of the state of Oregon which has two death acts. A general statute creates liability for any wrongful act or omission resulting in death. An Employers' Liability Law renders an employer additionally liable for failure to "use every device, care and precaution which it is practicable to use for the protection and safety of life and limb "[33]

In *Hess* the district court had refused to apply the higher standards of the Oregon Employers' Liability Law because it felt admiralty was required to use the regular death act and to apply extra requirements over and above admiralty principles would violate federal admiralty rules, hence would be unconstitutional. The Ninth Circuit affirmed.[34] In the Supreme Court, Justice Stewart, speaking for six members, held that under *Tungus*, the defendant's conduct must be measured by state standards and not by admiralty rules as such. Hence the higher requirements of the Oregon Employers' Liability Law must be enforced, no constitutional impediment being perceived.

In *Hess* the same four justices who had dissented in *Tungus* entered a caveat, as they had in *Goett*, that they joined in the decision solely under the compulsion of *Tungus*, but reserved their position as to whether *Tungus* should be overruled.[35] Harlan and Frankfurter dissented[36] because they felt the application of the Oregon statute was unconstitutional in that it imposed greater liability than the maritime law. Justice Whittaker, in a separate memorandum opinion,[37] said, as he had in *Goett*, that he considered that federal maritime principles applied remedially supplemented by the state statute. He therefore agreed that the additional requirements of the state law were unconstitutional because they upset the necessary nation-wide uniformity of admiralty principles.

At this stage, then, the four justices continued to disapprove the decision in *Tungus* and to reserve the right to overrule it, while Justice Whittaker seemed to have resigned from the *Tungus* majority and joined the dissenters. Since then, Justices Frankfurter and Whittaker have been replaced by Justices White and Fortas, whose views are not not yet known. Considering the attitude originally evinced by Brennan, Black, Douglas and Warren, it is entirely possible that *Tungus* will some day be overruled, and the Court will decide that federal maritime principles automatically apply to state maritime deaths in

[33] ORE. REV. STAT. § 654.305 (1965).
[34] 259 F.2d 285, 1958 A.M.C. 2057 (1958).
[35] Hess v. United States, 361 U.S. 314, 321-22, 1960 A.M.C. 527, 534 (1960).
[36] *Id.* at 322, 1960 A.M.C. at 535.
[37] *Id.* at 339, 1960 A.M.C. at 549.

territorial waters, with no need to decide whether the state statute can or should be construed to "incorporate" maritime principles. That the issue has not been re-examined and expressly ruled upon again is perhaps explained by the fact that, as will be pointed out, most of the post-*Tungus* decisions have construed state statutes to incorporate maritime principles.

The statutes of the various states differ in wording and an interpretation in favor of incorporating maritime principles is easier in some cases than others.[38] In a few states, for example, Virginia,[39] Maryland,[40] Mississippi,[41] Florida[42] and Oregon,[43] the statute speaks in terms of admiralty remedies or principles. Both Virginia[44] and Maryland[45] create liability in rem against a vessel. This is a purely admiralty concept, hence it is strongly arguable that the legislatures of these states had maritime law in mind and intended admiralty principles to apply to maritime deaths.

Statutes of other states refer to a wrongful act, neglect or default *such as would have entitled the decedent to recover for personal injuries if he had survived.* Since an injured man can recover from the shipowner for unseaworthiness without "fault," and his own negligence would reduce but not bar recovery, it is again strongly arguable that liability for death is determined by the same maritime principles which would have applied had the man been injured instead of killed. Examples of this type of statute are those of New Jersey,[46] Ohio[47] and Maine.[48]

A third group of statutes consists of those which merely create liability for wrongful act, neglect or default. Examples are Washington[49] and California.[50] This wording does not, on its face, give any indication that the legislature had maritime law in mind, but, as will

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[38] A list of state death acts, together with an attempt at classifying some of them, can be found in Judge Brown's dissenting opinion in Emerson v. Holloway Concrete Products Co., 282 F.2d 271, 285 (5th Cir. 1960).

[39] CODE OF VA. § 8-633 (Supp. 1966).

[40] ANN. CODE MD., Art. 67, § 1 (1957).

[41] 2 MISS. CODE § 1565 (1942).

[42] FLA. STATS. ANN. § 768.01 (1964).

[43] ORE. REV. STAT. § 783.010 (1965). See also ORE. REV. STAT. §§ 30.010-30.100 (1965).

[44] See statute cited note 39 *supra.*

[45] See statute cited note 40 *supra.*

[46] N.J. STATS. ANN. § 2A.31-1 (1952).

[47] PAGE'S OHIO REV. CODE ANN. § 2125.01 (1954).

[48] ME. REV. STATS. ANN., Title 18, § 2551 (1954).

[49] REV. CODE OF WASH., Title 4, § 4.20.010 (1965 Supp.).

[50] CAL. CODE CIV. PROC. § 377 ("wrongful act or neglect").

be pointed out, this does not present a very serious obstacle to a maritime interpretation.

Liability for Unseaworthiness

On the question of incorporating the maritime rule of liability without fault for unseaworthiness, the decisions are overwhelmingly in favor of liability under state wrongful death statutes of all types. There are only three cases denying liability: *Emerson v. Holloway*,[51] *Graham v. A. Lusi, Ltd.*[52] and *Lee v. Pure Oil Co.*[53]

Lee was decided before *Tungus*, and was based on two grounds: one that there was no liability for unseaworthiness and the other that, even under admiralty principles, no warranty of seaworthiness was owed to the decedent, who was a shore employee delivering baked goods to a vessel. *Graham* was also decided before *Tungus*, and did not consider or use the approach of that case. *Emerson* was decided after *Tungus*, with a strong dissent by Judge Brown, but was based on a narrow ground which had also been put in doubt by another Supreme Court decision.

The *Emerson* court held that, under Florida law, the decedent had been a licensee, not an invitee, hence no general duty of care was owed to him under the state law However, insofar as *Emerson* is based on state law distinguishing between classes of visitors as licensees or invitees (or social guests versus business guests), its authority has been somewhat weakened by *Kermarec v. Compagnie Generale Transatlantique*.[54] In *Kermarec* the lower court applied state law to determine the extent of the duty owed by a shipowner to a non-business visitor (social guest of a member of the crew of a merchant vessel) who was injured while aboard. The Supreme Court, however, discarded the common law classifications between licensee and invitee, holding that the maritime law required a shipowner to use reasonable care toward all persons lawfully coming aboard and that this principle must be uniformly applied throughout the admiralty jurisdiction, to the exclusion of state law distinctions between various kinds of visitors. It should be noted, however, that *Kermarec* involved injury, not death; hence it is not completely at odds with the Fifth Circuit's approach in *Emerson*, where a death was involved and the state statute was admittedly the only source of a cause of action.

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[51] 282 F.2d 271, 1961 A.M.C. 1484 (5th Cir. 1960) (Fla. statute).
[52] 206 F.2d 223, 1953 A.M.C. 2161 (5th Cir. 1953) (Fla. statute).
[53] 218 F.2d 711, 1955 A.M.C. 820 (6th Cir. 1955) (Tenn. statute).
[54] 358 U.S. 625, 1959 A.M.C. 597 (1959).

A more serious objection to *Emerson* is that the Florida statute there under consideration provided that, in the event of death by wrongful act, neglect, carelessness or default of any vessel or person thereon, the vessel would be liable in rem.[55] Arguably, such use of maritime terms and the granting of the admiralty remedy of suit in rem against the vessel indicates that the Florida legislature intended maritime principles to apply Despite these weaknesses in the majority opinion in *Emerson*, the Supreme Court denied certiorari.[56]

All other decisions since *Tungus* have held that the state statute should be construed to incorporate the maritime rule of a shipowner's absolute liability for unseaworthiness, regardless of negligence.[57]

So far as the author's research has gone, only one state has a statute which can hardly be construed to create a cause of action for death by unseaworthiness without negligence. The Pennsylvania wrongful death statute provides for recovery where death was caused by "unlawful violence or negligence."[58] Such words as "neglect" or "default" are not used, nor is there any reference to admiralty remedies. Unless the approach of the minority in *Tungus* (maritime law remedially supplemented by the state statute) becomes the majority rule, it is difficult to see how this Pennsylvania statute can be "interpreted" to create a cause of action for unseaworthiness without negligence.[59]

Contributory Negligence

When the issue is the effect of the decedent's own negligence, the trend of the decisions is again toward the maritime interpretation.[60]

[55] FLA. STAT. § 768.01 (1959).

[56] 364 U.S. 941 (1960).

[57] Compania Transatlantica v. International Shipping Agency, 358 F.2d 209 (1st Cir. 1966) (Puerto Rico statute); Curry v. Fred Olsen Line, 367 F.2d 921 (9th Cir. 1966) (Cal. statute); Cunningham v. Redieret Vindeggen, 333 F.2d 308 (2d Cir. 1964) (N.Y. statute); Union Carbide v. Goett, 278 F.2d 319 (4th Cir. 1960) (W Va. statute); Holley v. The Manfred Stansfield, 269 F.2d 317, 1959 A.M.C. 2189 (4th Cir. 1959) (Va. statute); Grigsby v. Coastal Marine Service, 235 F Supp. 97 (W.D. La. 1964) (La. statute); State v. Nabella, 176 F Supp. 668 (D. Md. 1959) (Md. statute); Clark v. Iceland S.S. Co., 179 N.Y.S.2d 708, 715 (1958) (N.Y. statute).

[58] PA. STAT. ANN. tit. 12, § 1601.

[59] The fullest discussions and the best illustrations of the modern approach to this problem of interpreting the state statute will be found in Compania Transatlantica v. Melendez Torres Agency, 358 F.2d 209 (1st Cir. 1966), and Curry v. Fred Olsen Line, 367 F.2d 921 (9th Cir. 1966).

[60] See Curry v. Fred Olsen Line, *supra* note 59; Olson v. New York Cent. R.R., 341 F.2d 233 (2d Cir. 1965) (N.Y. statute); Anthony v. International Paper Co., 289 F.2d 574 (4th Cir. 1961) (S.C. statute); Holley v. The Manfred Stansfield, 269 F.2d 317, 1959 A.M.C. 2189 (4th Cir. 1959) (Va. statute); The Devona, 1 F.2d 482 (D. Me. 1924) (a pre-*Tungus* decision using comparative negligence under the Maine statute);

One reason for this is that where there is no state court decision interpreting the state statute in a maritime death case, the federal courts are free to make their own guess as to how the state court would construe the statute and can decide that the state court would probably interpret its statute to incorporate maritime principles. In fact, since 1958 only two cases, state or federal, have held the decedent's contributory negligence in a maritime death case to be a complete bar. One is *Byrd v. Belcher*,[61] a district court case which does not cite or discuss *Tungus* or *Halecki*. The other is a Kentucky decision, *Gregory v. Paducah Midstream Serv.*[62] in which the Kentucky Court of Appeals cites *Tungus* for the rule that the state law controls and *Goett* for the rule that the state is free to decide for itself whether to apply land or maritime principles to a death on inland waters. It then concludes that the Kentucky common law bar for the decedent's contributory negligence applies to maritime deaths.

Where the highest state court has actually ruled on the precise issue of the effect of the decedent's negligence in maritime death cases, however, it is difficult to see how a federal court, looking to the state law alone as required by *Tungus* and *Halecki*, can venture to guess or predict that the state court if faced with the issue again, would overrule its earlier decision and switch to a maritime interpretation. In at least two cases decided before 1958,[63] the highest court of a state interpreted its state death act to bar all recovery for a maritime death if the decedent's negligence contributed to the death. Although those cases were decided before 1958, and did not approach the problem in the light of the considerations stressed in *Tungus* and *Halecki*, still they are decisions of the state court as to the effect of the state statute on a maritime death and are presumably binding on a federal court.[64]

The modern trend toward a "maritime interpretation" is illustrated by the history of the interpretation of the wrongful death statutes of two states. Under the Texas Wrongful Death Act contributory negligence was held to bar recovery for a maritime death in *Truelson v.*

Wright v. Cion Corp. Peruna Desvaspores, 171 F Supp. 735, 1959 A.M.C. 2505 (S.D.N.Y. 1959) (N.J. & Del. statutes); Vassallo v. Nederl-Amerik Stoomv Maats Holland, 162 Tex. 52, 344 S.W.2d 421 (1961) (Tex. statute).

[61] 203 F Supp. 645 (E.D. Tenn. 1962).

[62] 401 S.W.2d 40, 1966 A.M.C. 2008 (Ky. 1966).

[63] Cromartie v. Stone, 194 N.C. 663, 140 S.E. 612 (1927); Roswall v. Grays Harbor Stevedore Co., 138 Wash. 390, 244 Pac. 723 (1926).

[64] Those federal cases cited *supra* in note 5, which applied the common law rule of contributory negligence, were also decided before *Tungus* and *Halecki* and are now of doubtful authority.

Whitney & Bodden Shipping Co.,[65] with no discussion thought necessary The same ruling was again made under the Texas statute (it was conceded by both parties that contributory negligence would bar recovery) in *Graff v. Parker Bros. & Co.*[66] This interpretation was accepted by an intermediate appellate court of the state in *Vassallo v. Nederl-Amerik Stoomv Maats Holland*[67] where the Texas Court of Civil Appeals cited *Tungus* and *Halecki* for the rule that state law controls and held that contributory negligence was a complete bar to recovery for a maritime death under the Texas statute. The opinion points out that the statute had been enacted long ago, before the present liberal maritime rules were adopted, and that five different bills in the state legislature to adopt the rule of comparative negligence had been defeated.

On further appeal, however, the Texas Supreme Court reversed the intermediate court and held that the Texas statute should be interpreted to incorporate the maritime rule of comparative negligence for a maritime death,[68] citing *The Devona*,[69] *Holley v. The Manfred Stansfield*[70] and *Wright v. Cion Corp. Peruna Desvaspores*.[71]

The history of the California statute also presents a steady change. In *Mortenson v. Pacific Far East Line*[72] a libel for wrongful death in California waters contained one count charging unseaworthiness. This was dismissed on motion, on a holding that the state statute created no liability for non-negligent unseaworthiness.

Later, in *Aldridge v. States Marine Corp.*[73] the question of contributory negligence in a maritime death case under the California statute was considered. The district court had dismissed the complaint on the ground that contributory negligence of the decedent appeared on the face of the complaint, and contributory negligence was a complete defense under the California statute. This was reversed by the Ninth Circuit, but not upon a contrary interpretation of the statute. Instead, the holding was simply that a dismissal upon motion was premature because the jury might find decedent was not negligent, the issues might be changed by amendments to pleadings or by pretrial order,

[65] 10 F.2d 412 (5th Cir. 1925).

[66] 204 F.2d 705, 1953 A.M.C. 2166 (5th Cir. 1953).

[67] 337 S.W.2d 309, 1960 A.M.C. 1632 (1960).

[68] Vassallo v. Nederl-Amerik Stoomv Maats Holland, 162 Tex. 52, 344 S.W.2d 421 (1961).

[69] 1 F.2d 482 (D. Me. 1924).

[70] 262 F.2d 317 (4th Cir. 1961).

[71] 171 F Supp. 735, 1959 A.M.C. 2505 (S.D.N.Y. 1959).

[72] 148 F Supp. 71, 1956 A.M.C. 2275 (N.D. Cal. 1956).

[73] 265 F.2d 554, 1959 A.M.C. 1401 (9th Cir. 1959).

and by the time the case came to trial the California courts might rule on the issues. In short, *Aldridge* evaded a decision on the interpretation of the California statute and contented itself with pointing out that the state court might decide that the law for wrongful death should be uniform in the state, whether occurring on shore or on the water, or might decide that the law should be uniform for maritime torts whether they resulted in injury or death.

Finally the issue was squarely presented in *Curry v. Fred Olsen Line*,[74] and the Ninth Circuit had to interpret the California statute. The case is interesting in several respects.

First, in *Curry* the complaint alleged both unseaworthiness and negligence, in separate counts. The district court granted a summary judgment to the defendant on the unseaworthiness count and the case was tried on the negligence count, resulting in a verdict for the defendant. The plaintiff appealed, assigning only the dismissal of the unseaworthiness count as error and not contesting the judgment on the negligence count. The California wrongful death statute[75] refers only to death caused by wrongful act or neglect. It does not use the word "default," and it does not mention such maritime concepts as liability of a ship. Nor does it refer to an act or neglect such that the decedent could have recovered for injuries had he lived. The Ninth Circuit nevertheless held that the California Supreme Court, which had pioneered in absolute liability for defective products, would construe the state death act to create liability for unseaworthiness without negligence.[76]

Secondly, in *Curry* the jury found, in answer to a special interrogatory, that the decedent had been contributorily negligent. Appellant shipowner argued that, even if unseaworthiness were a ground of liability, the decedent's contributory negligence should bar recovery in any event, citing the California Supreme Court case of *Buckley v. Chadwick*,[77] which held expressly that the decedent's contributory negligence was a complete bar to recovery for wrongful death. The Ninth Circuit, however, distinguished *Buckley* on the ground that there the basis of liability was the defendant's negligence. Therefore all it stood for was a rule that decedent's contributory negligence is a defense to an action for wrongful death based on negligence. Since the federal rule in unseaworthiness cases is that decedent's negligence merely mitigates damages, the Ninth Circuit held that the

[74] 367 F.2d 921 (9th Cir. 1966).

[75] CAL. CODE CIV. PROC. § 377.

[76] Curry v. Fred Olsen Line, 367 F.2d 921, 926 (9th Cir. 1966).

[77] 45 Cal. 2d 183, 289 P.2d 242 (1955).

California courts would follow this same rule under similar circumstances. It said, at the conclusion of its opinion:

> Negligence is an established concept of the common law, and it is not surprising that state courts apply the common law defense of contributory negligence in such cases. Unseaworthiness, on the other hand, is an admiralty concept, and it seems to us that, once a state applies its wrongful death statute to such a cause of action, it is probable that it will also apply the admiralty concept as to the defense of contributory negligence.[78]

Curry seems to concede that, even in a maritime death case, under California law the decedent's contributory negligence will bar any recovery for the defendant's negligence. Its holding is that the California courts would adopt the maritime concept of strict liability for unseaworthiness and then accordingly adopt the maritime rule that the decedent's negligence only mitigates the damages in the case of death from unseaworthiness.

In the light of the holding that the California court would adopt admiralty principles to measure the conduct of both parties in an unseaworthiness case, the *Curry* decision is rather illogical in suggesting, and apparently conceding, that contributory negligence will still be a complete defense in a negligence case. Under the maritime law the plaintiff's negligence is never a complete defense. Regardless of whether the defendant is liable for negligence or unseaworthiness, in admiralty the injured plaintiff's negligence merely reduces the damages proportionately to the degree of his fault. If the California courts would (as the Ninth Circuit says) adopt the maritime principle of unseaworthiness in interpreting the state death act, why would they refuse to adopt the maritime rule of comparative negligence for all other maritime torts resulting in death?

The wording of the *Curry* opinion leads to a strange result indeed. Negligence is always blameworthy, while liability for unseaworthiness without "fault" (without negligence or intentional wrongdoing) finds its only justification in the social desirability of protecting the victims of maritime industrial accidents. Under *Curry*, if the decedent was guilty of negligence, the *negligent* shipowner escapes all liability, while the owner whose vessel was unseaworthy *without* his knowledge, participation or fault is liable for some percentage of the total damages. If different principles are to apply to the two situations, elementary notions of fair play and justice would seem to dictate that

[78] 367 F.2d at 929-30.

the two rules should be reversed. That is, the decedent's negligence should bar recovery for unseaworthiness without fault, but should only mitigate damages where the defendant was negligent.

The *Curry* decision seems to create a curious situation in which the defendant shipowner might find it advisable to argue strongly that he was negligent, so that the decedent's negligence would bar all recovery Conversely, where the decedent's own negligence is pretty clear, the plaintiff will want to argue that the defendant was not negligent in any way, and should beware of even alleging negligence! This would be bad enough in a case where potential negligence and potential unseaworthiness are separate factors, with a choice presented as to causation. What happens in a case where the negligence and the unseaworthiness relate to the same causative factor?

Suppose, for example, that a longshoreman employed by a stevedore company is killed when he continues to use a ship's winch which he knows, from operating it himself, is defective and dangerous. Suppose also that the master and bosun of the ship know that the winch is dangerously defective and have failed to do anything to have it repaired, although they were told by the owner to have it fixed and had ample time to do so before its use began.

The shipowner's employees were negligent in regard to the winch. Is the winchdriver's negligence a complete bar? The winch was defective, and the shipowner would be liable for such unseaworthiness even in the absence of negligence. Without negligence, this liability is reduced in amount, but not defeated, by the winchdriver's negligence, says the *Curry* decision. But there was negligence of the shipowner in allowing the winch to remain defective and allowing it to be used. Which rule applies—contributory negligence or comparative negligence? *Curry* creates the problem, but does not solve it. The solution remains to be stated in some other case when the issue is squarely presented.

Miscellaneous Rules

Since the basic approach to deaths on inland waters remains one of the federal court applying state law, several admiralty principles sometimes fall by the wayside.

One example is the question of a vessel's liability in rem. In an injury case founded on maritime law the ship is liable in rem as a routine matter of admiralty remedies. When a state death act is the foundation of liability, an admiralty action against the ship in rem

will lie only where the state statute creates such liability In *Andrade v. United States*[79] it was held that there was no in rem liability under the Rhode Island statute because the statute granted no such remedy In *State v. A/S Nye Kristianborg*[80] the Maryland statute had been amended, after the death there concerned, to grant a remedy in rem against an offending vessel. The court held that this amendment could not be given a retroactive effect and therefore dismissed the in rem cause of action, citing a number of cases.

While these last two cases were decided before *Tungus* and *Halecki*, their reasoning is not weakened thereby, since the extraordinary remedy of a suit against a vessel in rem cannot easily be "construed" into a statute which creates personal liability and says nothing about other remedies.

Admiralty rules governing time for suit are also superseded by state law in cases of death on inland waters. There is no statute of limitations in admiralty for maritime injury suits. The timeliness of suit is measured by the doctrine of laches, or unreasonable delay [81] While the admiralty court will take into consideration the statute of limitations of the state wherein it sits, an admiralty suit filed after the state statute has run will still be allowed if the libelant shows some excuse for his delay and if the respondent has not been prejudiced by the delay [82] In a death case, however, it is the state statute which creates the cause of action, and the state statute of limitations must be applied. The leading case is *Western Fuel Co. v. Garcia*,[83] where the Supreme Court pointed out that it must look to state law in an inland waters death case and held a suit under the California statute to be barred because it was not filed until sixteen days after the California one year limitation period had expired.

The *Garcia* rationale has been extended to questions of timeliness in suits brought under the Suits in Admiralty Act[84] and the Public Vessels Act[85] under which the United States has waived its governmental immunity for the torts of its vessels. Though these statutes fix a two year limitation period within which suits against the government must be filed, the Fifth Circuit in *Mejia v. United States*[86]

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[79] 107 F Supp. 463, 1952 A.M.C. 1960 (D.R.I. 1952).
[80] 84 F Supp. 775, 1949 A.M.C. 1329 (D. Md. 1949).
[81] GILMORE & BLACK, ADMIRALTY 296, 298 (1957).
[82] GILMORE & BLACK, ADMIRALTY 630 (1957).
[83] 257 U.S. 233 (1921).
[84] 41 Stat. 525 (1920), 46 U.S.C. §§ 741-52 (1964).
[85] 43 Stat. 1112 (1925), 46 U.S.C. §§ 781-90 (1964).
[86] 152 F.2d 686, 1946 A.M.C. 84 (5th Cir. 1945), *cert. denied*, 345 U.S. 992 (1952).

held that the timeliness of a suit for wrongful death brought against the Government was necessarily governed by state law An Army tug had collided with a yacht in Louisiana waters and an occupant of the yacht was killed. The Louisiana one year statute was held to bar the suit filed sixteen months after the death.

A similar result was reached in *Allen v. United States*[87] even though the state limitation period was not expressed as an integral part of the state death act. A libel for wrongful death in California waters was filed under the Public Vessels Act and Suits in Admiralty Act within the two year period, but more than one year after the death. California has only a general one year statute of limitations for death and personal injury actions. The libelant argued that the two year limitation of the federal statute applied and that the California statute of limitation was merely a limitation on the remedy rather than on the substantive cause of action, and hence not controlling. The Ninth Circuit rejected both arguments and affirmed the district court's dismissal of the action because of the one year bar of the state statute. The opinion points out that *Tungus* and the other Supreme Court decisions require the federal court to look to state law in the inland waters death situation and rejected the two year period of the federal statutes just as the Fifth Circuit did in *Mejia v. United States.*[88] As to the argument that the California statute created a limitation on the remedy, not the right, the Ninth Circuit held that it must accept state law as an integrated whole, and since the state limitation law "significantly affects" the results of litigation and is more than merely procedural, it must be applied in the admiralty court.

The admiralty rule that the absence of a vessel from the jurisdiction excuses a delay in suing also yields to state law In *Continental Cas. Co. v. The Benny Skou*[89] a longshoreman was killed aboard ship in Virginia waters and the ship sailed the next day It did not return to that jurisdiction for several years. Immediately upon its return it was libeled in rem and seized under the Virginia death statute which allows a suit in rem. The Fourth Circuit held, however, that the necessary resort to state law obligated it to apply the Virginia one year statute of limitations, which was contained in the statute creating the liability

State law has been held applicable in several other situations. For example, the language of the statute may limit the persons en-

[87] 338 F.2d 160 (9th Cir. 1964).
[88] 152 F.2d 686 (5th Cir. 1945), *cert. denied*, 328 U.S. 862 (1946).
[89] 200 F.2d 246, 1953 A.M.C. 109 (4th Cir.), *cert. denied*, 345 U.S. 992 (1952).

titled to recover for the wrongful death of the decedent. In *Dobrin v. Mallory S.S. Co.*[90] a longshoreman killed on a ship in Seattle left no wife or children, but had parents in Ireland. The Washington statute created a cause of action for wrongful death in favor of surviving spouses and children or, if there were no spouse or children, in favor of parents living in the United States at the time of the death. Applying this state law, the federal court held that the parents in Ireland had no cause of action.

In re Nueces County, Texas, Road Dist. No. 4[91] presents another example of the application of state law in an inland waters death problem. A ferryboat operated by a Texas governmental district was involved in an accident causing injury and death. The district filed a petition in admiralty to limit its liability to the value of the boat under the Federal Limitation of Liability Act.[92] The district thus invoked federal law and submitted itself to the jurisdiction of the federal admiralty court. The court pointed out that under Texas law a state governmental subdivision or agency is immune from tort liability, and that the statute creating this district expressly provided that it should not be liable for tort. The court then distinguished between the death claims and the injury claims. Since the injury claims arose under federal maritime law, the district was held liable under established admiralty law in spite of the Texas law As to the death claims, however, liability was denied because state law controlled for deaths in the inland waters of Texas.

The question of survival is the last aspect which should be considered briefly Many states have a "survival statute" as well as a "death statute." The latter creates a new cause of action for designated surviving heirs; the former provides for survival to certain heirs of the decedent's own cause of action for pain and suffering before death, in cases where death was not substantially contemporaneous with the tort. A true survival statute, where the facts allow it to operate, may create at least a partial cause of action, and may even supplement a true death cause of action.

Curtis v. Garcia y Cia[93] involved a death on the waters of Pennsylvania, which had both a true death act and a survival statute. The plaintiff sued under both statutes and the district court found contributory negligence by the decedent. It therefore denied recovery

[90] 298 Fed. 349 (E.D.N.Y. 1924).
[91] 174 F Supp. 846 (S.D. Tex. 1959).
[92] 49 Stat. 960 (1935), 46 U.S.C. §§ 183-86 (1964).
[93] 241 F.2d 30, 1957 A.M.C. 331 (3d Cir. 1957).

under the death act, applying state law, but allowed recovery under the survival statute, since the decedent's cause of action for injury would arise under admiralty law, with its rule of comparative negligence, and this maritime cause of action survived to the widow under the state survival statute.

Even in cases where another statute applies to cases of wrongful death the state survival statute may be invoked as a substitute for, or a supplement to, that other statute. At the beginning of this article *Gillespie v. United States Steel Corp.*[94] was cited for the rule that for the death of a seaman, the rights of his heirs are determined by the Jones Act to the exclusion of a state death act. In *Gillespie* the seaman died in Ohio waters. The suit alleged negligence of the shipowner under the Jones Act and unseaworthiness under the Ohio wrongful death act and also asked for damages for decedent's pain and suffering under the Ohio survival statute. The district court held the Jones Act to be the exclusive remedy and struck the allegations invoking Ohio statutes. The Supreme Court agreed that, insofar as a cause of action for a seaman's wrongful death was concerned, the Jones Act displaced the state statute. Since the Jones Act speaks solely in terms of the shipowner's negligence, there could be no cause of action for unseaworthiness. The Jones Act also provides for survival of the decedent's own cause of action based on negligence. This part of the federal statute was held not to be exclusive, the Supreme Court holding that the decedent's cause of action for unseaworthiness under general maritime law would survive under the state survival statute, citing its own dictum to that effect in *Kernan v. American Dredging Co.*[95]

In *Holland v. Steag, Inc.*[96] the court likewise held that the Jones Act was the exclusive remedy, hence negligence must be alleged and proved, but that the survival statute of Massachusetts could be invoked if death were not substantially contemporaneous with the casualty It is of interest that in *Holland* the death occurred on the high seas, but the Massachusetts survival statute was held applicable because the boat was owned by a Massachusetts corporation.

In *Abbott v. United States*[97] the death occurred on the high seas and the suit was not by the seaman's heirs against his employer. The applicable statute was therefore held to be the Federal Death on the

[94] 379 U.S. 148 (1964).
[95] 355 U.S. 426, 1958 A.M.C. 251 (1958).
[96] 143 F Supp. 203, 1956 A.M.C. 1834 (D. Mass. 1956).
[97] 207 F Supp. 468, 1962 A.M.C. 2350 (S.D.N.Y. 1962).

High Seas Act,[98] which has no survival feature. The court held that a state survival statute could be invoked for decedent's pain and suffering before death, since the federal act had not preempted the entire field. It therefore applied the survival statute of the tort-feasor's domicile.

Just v. Chambers[99] involved personal injuries in Florida waters, followed by the death of the tort-feasor. It was held unnecessary to decide whether tort causes of action survived the death of the tort-feasor under admiralty law, since the state statute providing for survival of liability despite the death of the tort-feasor would be applied by the admiralty courts. The accident occurred in Florida waters and the tort-feasor was a Florida resident, hence the Florida law was applied. If the tort-feasor was domiciled in state *A* and the tort was committed in state *B*, presumably the law of state *A*, the domicile, would control, but this precise question has not yet been decided.

Conclusion

In numerous cases it has been well settled that maritime torts are governed by the federal maritime law Even where suit is filed in a state court, the latter must ascertain and apply the substantive law of admiralty The same rule applies to a death on inland waters, but, as we have seen, the maritime law says that the state law is the only source of a right to recover. In an inland death case, then, the state court which looks for guidance to the maritime law finds itself, by a sort of "renvoi," thrown back upon its own resources.

One practical factor is apparent from the decisions: the plaintiff seeking recovery for a death on inland waters is perhaps better off if suit is brought in the federal court. If there is a state court decision squarely in point on such things as unseaworthiness without fault or comparative versus contributory negligence, it will be controlling in any court. In the absence of such a state court decision, the federal courts today seem disposed to conclude that the state court would construe the state statute to incorporate maritime principles.

The selection of the federal forum is, of course, virtually mandatory from plaintiff's standpoint where the courts of the particular state have not decided whether the state statute does or does not incorporate maritime principles, but the federal court in that state has decided that the statute should be construed to do so. The federal court will presumably continue to use its interpretation of the statute.

[98] 41 Stat. 537 (1920), 46 U.S.C. §§ 762-68 (1964).
[99] 312 U.S. 383, 1941 A.M.C. 430 (1941).

The state court is, by definition, the final and chief arbiter as to the meaning of the state's statutes, and the state court might decide to stick to common law principles, as it is free to do if it so chooses.

Unless there is a diversity of citizenship to sustain jurisdiction on the law side, such an action in the federal court must be filed in admiralty, where no jury is available. This is a very small price to pay for insurance that maritime principles will be applied.